IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. RIVERSIDE PIPELINE COMPANY, L.P., AND MID-KANSAS PARTNERSHIP,	)	
Appellants,	)	
v.	)	**Case No. SC86474**
PUBLIC SERVICE COMMISSION OF THE STATE of MISSOURI,	)	
Respondents.	)	

Appeal from the
Circuit Court of Cole County, Missouri
19th Judicial Circuit
Case No. 02CV324478
The Honorable Thomas J. Brown, III

SUBSTITUTE BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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ARGUMENT

I. **The Court of Appeals Did Not Err in Dismissing the Appeal By Applying An "Aggrieved" Person Test to MKP and Riverside. Supreme Court Rule, Statute, and Case Law Support the Use of An "Aggrieved" Person Standing Requirement Regardless of Whether This Case is Viewed As An Appeal Under Sections 386.540 and 512.020, or a Writ of Review under Section 386.510.**

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A. Standard of Review

"The question as to whether a particular person has status to contest the administrative action becomes one of law and depends upon an amalgram of considerations: the nature and extent of the interest of the person who asserts stautus, the character of the administrative action, the terms of the statute which enable the agency action, among them." *State ex rel. Schneider v. Stewart*, 575 S.W.2d 904, 909 (Mo. App. 1978).

B. The "Aggrieved" Party Test of Standing Was Properly Applied.

The requirement of being "aggrieved" appears prominently throughout Rule 84.05(e). This Rule provides, in part, that:

> If the circuit court reverses a decision of an administrative agency and the appellate court reviews the decision of the agency rather than the circuit court, the party aggrieved by the agency decision shall file the appellant's brief…The party aggrieved by the circuit court decision shall prepare the respondent's brief…

MKP/Riverside seek to reverse the decision of the Court of Appeals, *inter alia*, on the rationale that the aggrieved person test of Section 512.020 does not define the standing requirement for a petition for writ of review under Section 386.510 because a petition for a writ of review is not an appeal.

The Commission submits that the cases cited by MKP/Riverside in support of this position are inapposite.

For example, in *State ex rel. Consumers Public Serv. Co. v. Public Service Commission* (*Consumers*), 180 S.W.2d 40, 43-44 (Mo. banc 1944), a case heavily relied upon by MKP/Riverside, this Court reversed the holding of *American Petroleum Exchange v. Public Service Commission*, 176 S.W.2d 533, 534 (Mo. App. 1943) in connection with the scope of interest sufficient to support intervention and further review of Commission decisions.

The Court in *Consumers* held that requiring a specific, pecuniary interest that is directly affected by the Commission's order in order to seek a rehearing or pursue review proceedings (as decided in *American Petroleum*) was too narrow an

approach *(Consumers at 180 S.W.2d 44)*. This decision said nothing about the separate standing requirement that to support an appeal, the "interested" party (or in the case of review of a Commission order, "interested" person) must be adversely affected by the ruling.

The Commission submits that the standing requirement that a party be aggrieved to appeal or seek review is separate from, and in addition to, the requirement that the person have a sufficient interest in the subject of the proceeding to intervene or seek a re-hearing in a Commission proceeding.

In *State ex rel. McKittrick v Public Service Commission*, 175 S.W.2d 857, 860 (Mo. banc 1943) this court held that the party applying for a rehearing, writ of review, or an appeal of a Commission decision, shall be a party to the record, interested and aggrieved.

It is noteworthy that six years after the *Consumers* case was decided, in *State ex re. St. Louis County v. Public Serv. Comm'n, et al.*, 228 S.W. 2d 1, 3 (Mo. 1950) the appellant argued that what constituted an appealable order or judgment in relation to a Commission proceeding was governed by the Public Service Commission law, because it provided its own code for judicial review (as does MKP/Riverside in referring to Section 386.510[1] as the appropriate "code" for review).

[1] All references to statutes refer to RSMo 2000.

Significantly, the appellant cited the *Consumers Public Service Co. et al. v. PSC, supra*, as authority for that viewpoint. In rejecting that position, the Court defined the holding in *Consumers* this way:

> The cited case refutes rather than supports appellant's argument…The case holds that where an order was against an interested party to a Public Service Commission proceeding, such interested party was a party "aggrieved" within the meaning of Section 1184 (228 S.W.3d).

The key words above are "aggrieved" and "against"**.** This Court clearly imposed a requirement that an order be against an interested party before that party could be considered aggrieved for purposes of standing to seek review.

The Western District made it clear that the Commission's order was not "against" MKP and Riverside. The Commission agrees. Excerpts from the *Court of Appeals Opinion at page 8* are as follows:

> Applying the "aggrieved" requirement of Section 512.020 to Chapter 386 appeals, an aggrieved party has been determined to be any "interested" party against whom an order has been entered by the PSC (citing *State v. Pub. Serv. Comm'n*) …
>
> Here, the "PSC's order or decision denying the Staff's recommendation to disallow certain costs of MGE under the MKP sales agreement for the ACA period under review in Case No. GR-96-

450 was not "against" MKP and Riverside and, therefore they were not aggrieved thereby, such that they lacked standing to appeal that decision to this court.

As the Western District correctly points out *(Op. at page 3)* MKP/Riverside were allowed to intervene in the case at the Commission level because they had a financial interest in the outcome of the prudence review in Commission Case No. GR-96-450. MKP/Riverside had agreed in their respective sales and transportation agreements with MGE that they would reimburse it for any amounts that MGE paid to MKP and Riverside under the agreements that were ultimately disallowed by the PSC in MGE's recovery of costs as part of the ACA process.

In other words, MKP/Riverside's interest stemmed from an indemnity clause requiring it to reimburse MGE for any regulatory disallowance based on their contracts.

Here, the Commission's decision rejected any disallowance *(ROA 514, Commission Report and Order at page 30)* connected with these contracts, and any need for indemnification from MKP/Riverside was eliminated. Thus, even though MKP/Riverside had an "interest" in the Commission proceedings, they were not aggrieved by the decision of the Commission and had no standing to seek further review.

MKP/Riverside cite *State ex rel. Southwestern Bell Tel. v. Brown,* 795 S.W.2d 385, 388 (Mo. Banc 1990) for the proposition that the review permitted under Section 386.510 is a separate action, and for purposes of procedural analysis, not an appeal. Again, the Commission submits that this case is irrelevant, because whether or not a judicial review is obtained by an appeal or a writ of review, the party seeking further review must still be "aggrieved" by the Commission decision for standing purposes.

Interestingly enough, however, in *Bell* there is support for viewing this case as an appeal. This Court has indicated when the legislature intends to characterize an action as an "appeal" it uses specific language to that effect. Significantly, this Court directly referred to Section 386.540, in *Bell at 388,* as an example of what constitutes an appeal. Comments from the Court were as follows:

> …where the legislature intended to use the word appeal, it did so. Section 386.540.1…permits the PSC or other parties to the proceeding before the circuit court to "prosecute an appeal to a court having appellate jurisdiction in this state. Such appeals shall be prosecuted as appeals from judgment of the circuit court in civil cases except as otherwise provided in this chapter. (Id. at 388)

What happened here mirrored the language of Section 386.540 because the PSC filed an appeal with the Western District based upon a circuit court's reversal

of its Order in Commission Case No. GR-96-450. The Western District agreed that Section 386.540.1 applied to this case. *(Op at pgs. 7-8)* The Court went on to reason that since this was an appeal by the Commission, Section 512.020 was also applicable *(Op at p. 8).*

The Commission contends that should this Court decide to view this case as an appeal, there is support in the *Bell* decision, the rationale of the Western District in this case, and in the statutory language of Section 386.540.1 to do so.

Regardless of Whether Section 512.020 applies, MKP/Riverside Are Not Aggrieved by the Commission's Order and They Lack Standing to Seek Review.

(Responds to Points Relied On IC)

MKP/ Riverside argue, in the alternative, *at pages 21-22 of their Brief*, that even if Section 512.020 applies, their petition for a writ of review was proper because a "jurisdictional ruling must be subject to appeal, even if it is not specified by statute" citing *Barlow v. State,* 114 S.W.3d 328 (Mo. App. 2003) in their Brief.

The Commission would respond by saying that that the Western District has already considered and correctly decided the jurisdictional issue complained of by the MKP/Riverside herein.

The Western District found that the Commission's decision relating to the contested stipulation was interlocutory in nature, and not subject to appeal. The Court properly concluded that the only final decision subject to judicial review in accordance with Chapter 386 was the Commission decision denying the Staff's recommendation for an ACA disallowance, and that MKP/Riverside were not aggrieved by that decision (*Op at p 9).*

MKP/Riverside's allegation *at page 22 of its Brief* that the Commission has no authority to judge anyone's legal rights is also irrelevant. The purpose of the ACA proceeding before the Commission in Case No. GR-96-450 was to determine the allowable gas costs and resultant rates for MGE during the ACA time frame under review. The Commission has the authority to set regulated utility rates under Sections 386.250, 393.130 and 393.150 of the Missouri statutes and relevant case law, see *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Commission of Missouri,* 585 S.W.2d 41, 48, 49 (Mo.banc 1979).

Simply put, MKP/Riverside were not aggrieved by the Commission's decision in this case because the Commission refused to allow any gas cost disallowances proposed by its Staff that would have resulted in an indemnification obligation from MKP/Riverside to MGE *(ROA 514, Commission R & O, p. 30).*.

Lastly, MKP/Riverside argue at *page 23 of their Brief* that if Section 512.020 applies they are "aggrieved" because they are harmed by continued

litigation over the contested stipulation and they cite *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915 (Mo. App 2003) as authority for that contention. The citation is misplaced because the costs and hardship imposed they allege are self-inflicted.

MKP/Riverside continue to lose sight of the fact that the Commission's decision in GR-96-450 was not "against" them. Ongoing litigation costs have been incurred by MKP/Riverside through their own choice and actions. The legal reality that MKP/Riverside refuses to accept is that there is no order from the Commission requiring MKP/Riverside to reimburse MGE for any gas costs disallowance associated with the disputed Stipulation.

The Court of Appeals correctly pointed out that in the next established ACA case at the Commission, MKP/Riverside would be free as interested, intervening parties, to seek injunctive relief against the Commission, based on the Stipulation to prevent a prudence review and future prudence reviews associated with the Missouri Agreements *(Op at p. 10).*

The fact that MKP/Riverside are not content merely to wait for the next ACA case and have incurred further legal costs is not determinative of the merits of the Western District's decision in this case.

II. The Commission did not err in reaching the Merits of the Staff's Proposed Disallowance Review of the Decisions Associated with the Missouri Agreements. Responds to Points Relied on II, and II A. and II B.

It is undisputed that the reviewing circuit court found the keystone provisions of the Stipulation, the first two sentences of paragraph 5, to be ambiguous (*L.F. 106*). It is undisputed that the reviewing circuit court sent the agreement back to the Commission for interpretation (*L.F. 102)*. However, on remand to the Commission, the circuit court noted the need for "a sufficient and appropriate evidentiary basis" for resolution of any language found to be ambiguous *(L.F. 102, paragraph 10 of the Order of the Court in CV199-53CC*).

The Commission concluded, after a thorough review of both the rules of contract construction, and the evidence admitted into the administrative hearing record that the evidence was inconclusive and did not provide a basis for choosing the interpretation offered by the parties. (*See the Commission's Report and Order, ROA pp. 495-496, ROA pp. 502-510)*

Therefore, The Commission submits that it followed the directive of the reviewing circuit court because it attempted to find a sufficient evidentiary basis to give final meaning to the contested agreement as ordered by the reviewing circuit court as part of the interpretation process.

A. Standard of Review

The Commission's treatment of the evidence offered during the administrative hearing is under scrutiny in this appeal, and as this Court is well aware, it must view the evidence presented to the Commission in the light most favorable to the Commission's order, and afford the Commission the benefit of all reasonable inferences drawn therefrom, *Deaconess Manor Asss'n v. PSC,* 994 S.W.2d 602, 608 (Mo. App. W.D. 1999). In addition, deference must be given to an administrative agency in the matter of the weight to be given conflicting evidence *Ballew v. Ainsworth,* 670 S.W.2d 94, 102 (Mo. App. 1984). If the evidence permits either of two opposed findings, the court must defer to the findings of the Commission. *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n,* 37 S.W.3d 287, 295 (Mo. App. W.D. 2000). Only when a Commission order is contrary to the overwhelming weight of the evidence may a court set it aside. *State ex rel. St. Louis-San Francisco Ry. Co. v. Public Service Commission*, 439 S.W.2d 556, 559 (Mo. App. 1969).

In terms of agreements, the construction of written contracts is ordinarily a question of law, not fact. *West v. Jacobs,* 790 S.W.2d 475, 480 (Mo. App. 1990). However, the trial court's construction of a contract, being a legal conclusion, is not binding on appeal. *Anchor Centre Partners, Ltd., v. Merchantile Bank, N.A.*, 803 S.W.2d 23, 32 (Mo. banc 1991).

While deciding whether a document is ambiguous is a question of law, weighing the witnesses' testimony to ascertain the parties' intentions is a question of fact. *United Siding Supply, Inc. v. Residential Imp. Services*, 854 S.W.2d 464, 469 (Mo. App. W.D. 1993). Where an ambiguity exists, it is for the trier of fact to resolve the ambiguity. *Edgewater Health Care v. Health Systems*, 752 S.W.2d 860, 865 (Mo. App. 1988). Resolving an ambiguity in a contract is a matter within the purview of the jury (or fact finder). *Jamerson v. State of Mo.*, 97 S.W.3d 21, 34 (Mo. App. E.D. 2002).

The general yardstick applied to the review of a Commission decision is whether it is lawful and reasonable. *State ex rel. GTE North, Inc. v. Public Service Comm'n*, 835 S.W.2d 356, 361 (Mo. App. 1992). A Commission order is lawful if it is statutorily authorized; it is reasonable if supported by competent and substantial evidence. *State ex rel. Marco Sales v. Public Service Commission*, 685 S.W.2d 216, 218 (Mo. App. 1984). "Substantial evidence" is evidence, which, if true, would have a probative force upon the issues, and necessarily implies competent, not incompetent evidence. *State ex rel. Mobile Home Estates v. Public Serv. Comm'n*, 921 S.W.2d 5, 9 (Mo. App. 1996).

In sum, if the Commission's decision is supported by reason and is not arbitrary or capricious, it becomes the task of the reviewing court to affirm the

Commission's decision. *State ex rel. Utility Consumer's Council*, 606 S.W.2d 222, 223 (Mo. App. 1980).

An Order of the Public Service Commission has a presumption of validity, and the burden is on the party attacking it to prove its invalidity. *State ex rel. Midwest Gas Users' Assn. v. Public Service Comm'n*, 976 S.W.2d 470, 476 (Mo. App. W.D.1998). On appeal, the Court reviews the Commission's decision, and not the circuit court's judgment. *State ex rel. Alma Tel. Co. v. Pub. Serv. Comm'n*, 40 S.W.3d 381, 387 (Mo. App. 2001).

B. The Commission's Order Did Not Unlawfully Fail to Interpret the Stipulation to Preclude the Staff's Proposed Prudence Disallowance. Responds to Point II B and Point II B 1.

At *page 28 of their Brief* MKP/Riverside understandably chose to emphasize the first sentence in Paragraph 5 of the contested stipulation (*Commission Report and Order, GR-96-450, at pages 21 and 22, ROA 505*) because that language lends support to their version of the ultimate meaning of the document regarding prudence reviews. That sentence, of course, reads:

> *As a result of this Stipulation and Agreement, the Signatories agree that neither the execution of the MKP/WR Sales Agreement [Mid-Kansas 1] and the Riverside/WR Transportation Agreement 1, nor the decisions*

associated with the Missouri Agreements shall be the subject of any further ACA prudence review.

However, while this language appears to validate the Appellant's claims about the ultimate meaning of the Stipulation, the sentence that immediately follows appears to negate it. That sentence or phrase reads as follows:

In addition, the Signatories agree that the transportation rates and gas costs charged pursuant to the Missouri Agreements shall not be the subject of any further ACA prudence review ***until*** *(emphasis added) the case associated with the audit period commencing July 1, 1996 and ending June 30, 1997 (ROA 505).*

The Commission submits that this sentence reasonably indicates that the transportation rates and gas costs can be the subject of an ACA prudence review for the audit period beginning on July 1, 1996, and ending on June 30, 1997, and by implication, thereafter. The Commission stated in its (*Report and Order at page 25, ROA 509)* that "this clearly implies that after July 1, 1996, the Commission can again review the prudence of those rates and costs."

The courts have instructed that in construing a contract, analysis must begin with the language of the document itself. *In re City Metals Co., Inc.*, 181 B.R. 398, (Bkrtcy. W.D. 1995). In addition, courts presume that the words used in a

contract are intended to have their natural and ordinary meaning. *Lueckenotte v. Lueckenotte*, 34 S.W. 3d 387, 395 (Mo. banc 2001).

The issue in Commission Case No. GR-96-450 was the reasonableness of transportation and gas costs incurred by MGE for the time frame beginning on July 1, 1996 and ending on June 30, 1997. Therefore, it was evident to the Commission that these two key sentences or phrases in the Stipulation were fatally flawed with inconsistent and contradictory terms regarding the scope of ACA prudence reviews for the audit period beginning on July 1, 1996, and ending on June 30, 1997, and thereafter.

The Appellants contend that the second sentence of the Stipulation that appears to authorize prudence reviews after a certain period is negated by a following third sentence that contains a *footnote 1* which states, among other things, that "… *any issues related to gas costs associated with the Missouri Agreements will be subject to the provision that unless MGE's costs subject to the Incentive PGA provisions to be filed rise to the level where a prudence review is triggered, there will be no prudence review of the Missouri Agreements."*

The Commission would note that *footnote 1* of the Stipulation *(ROA 506)* by its own terms provides for further prudence review of the Missouri Agreements, *i.e.* when MGE's gas costs rise to a specified level within MGE's incentive PGA provisions. Furthermore, prudence reviews include transportation costs which are

not mentioned by the Appellants. (If the footnote is examined further, it indicates that only gas costs issues and not transportation issues are meant to be included within its provisions.) Therefore, not all the elements of an ACA prudence review are embraced by the footnote. Specifically, the footnote says:

> *However, it is the intention of the Signatories that to the extent there are gas costs (**non-transportation**) (emphasis added) issues involving any of the Missouri Agreements which are relevant to the time periods after July 1, 1996 those amounts will come under the Incentive PGA provisions approved by the Commission.*

Since the footnote cited allows further prudence reviews via incentive guidelines, and since it omits transportation costs in its prudence related language, the Commission submits that the footnote does nothing to "illuminate" the ambiguity of the first two keystone sentences of paragraph 5 of the contested Stipulation regarding the future prudence review of the Missouri Agreements.

MKP and Riverside conclude *at page 30 of their initial Brief* that portions of Paragraph 5 of the Stipulation limit the Commission's authority over the Missouri Agreements on a going forward basis, to "compliance and operational reviews".

The Commission reviewed this interpretation of the agreement and rejected it. The Commission concluded at *page 25 of its Report and Order (ROA 509)* that "if prudence review of transportation rates and gas costs, as permitted for audit

periods beginning after July 1, 1996 by the second sentence, means only "compliance and operational review" then the second sentence of paragraph 5 (lines 5-9) is rendered superfluous and meaningless. Therefore, the prudence review of transportation rates and gas costs permitted under the stipulation and agreement *must* mean something more than merely compliance and review." (*ROA 509*).

The Commission contends that it cannot be faulted for this reasoning because Missouri case law supports the principle that a contract interpretation that gives meaning to all the provisions of an agreement is preferred to one which leaves some of the provisions without function or sense. *Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713, 717 (Mo. App.W.D. 1995).

During the analysis of what the Commission's continuing role regarding the Missouri Agreements might be, the Commission noted that the document's meaning was further clouded by the fifth sentence of paragraph 5. The Commission stated *at page 26 of its Report and Order (ROA 510):*

> That sentence states that the prudence of entering into Mid-Kansas 1 and Riverside/WR Transportation Agreement 1 is finally settled. *It seemingly would have been easy for the parties to have simply stated that the prudence of entering into the Missouri Agreements was* ***finally settled****, (emphasis added) rather than naming only two of the contracts.*

But they did not do so, leaving open the question of whether the Missouri Agreements that were not specifically named, Mid-Kansas II and Riverside 1, were also finally settled (*ROA 510, paragraph 1*).

In summary, given the huge degree of ambiguity in Paragraph 5 of the Stipulation, the Commission was reasonable and lawful in concluding that it was unable to determine the intended meaning of the stipulation. Since that meaning could not be gleaned from the parole and other evidence of record, the Commission acted appropriately in moving on to consider the merits of the Staff's proposed prudence disallowance in Commission Case No. GR-96-450.

Parole Evidence Was Insufficient to Show that the Parties' Intent Was to Preclude Future Prudence Reviews. The Commission Staff had more knowledge about the contested Stipulation than has been suggested. Responds to Point II B 1 and II B 2 a and II B 2 c.

The law is well-settled that the intent of the parties is crucial to the construction of a settlement agreement. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. Banc 1995). The evidence of record regarding the intent of the parties was extremely contradictory, and was obfuscated by changes in the employment and clients of two attorneys associated with the initial creation of the stipulation and its presentation to the Commission (*Commission's Report and Order, ROA, pp. 495-496*).

Mr. Shaw, one of Staff's witnesses, stated (*ROA Tr. Vol. 6, p. 954, lines 20-25, and p. 955, line 1*) that he did participate in the Staff's review of the agreement at issue; that he had reviewed at least ten earlier versions of the stipulation (*ROA Tr. Vol. 6. p. 959, lines 12-16*); that Shaw believed "so far as the decisions associated with the Missouri Agreements, the Staff certainly believed that it had a prior finding of imprudence, and that finding could of imprudence could carry on to future periods" (*ROA Tr. Vol. 6, p. 962, lines 15-19*) and, that Staff was never persuaded to even consider approving the Mid-Kansas/Riverside contract(s) in perpetuity (*ROA Shaw Surrebuttal, Ex. 15, at p. 9, lines 9 through 11*).

In addition, Staff witness, David Sommerer specifically testified in his *Rebuttal Testimony (ROA Ex.16) at page 6, lines 14 through 22, and page 7, lines 1 through 5,* what the Staff's intentions were in connection with the Stipulation, as follows:

> Question: Was it Staff's intent to permanently restrict prudence reviews for the Missouri Agreements?
>
> Answer: No. Throughout the course of the negotiations in Case No. GR-94-228 in late 1995 and early 1996 the Staff struggled with the concept of settling any Actual Cost Adjustment (ACA) period beyond the period at issue in Case No. GR-94-228.

Staff was reluctant to provide a "safe harbor" against *prudence* reviews for an extended period of time**.** The reason for this reluctance was the uncertainty about the level of detriment in future years and an unwillingness to give a pre-approval of such a long term contract. The Staff in a prior ACA case (Case No. GR-93-140) had been precluded from reviewing a long term contract relating to the Tight Sands litigation and was concerned about the consequences of similar long-term pre-approvals. With respect to the 1991 contract, after a lengthy negotiation process the Staff was willing to compromise on a limited safe harbor period, based on the settlement received**.** This safe harbor period ended after June 30, 1996.

While the Commission acknowledged that there was no specific testimony from Staff witnesses regarding what happened as the stipulation's final version was drafted and signed *(ROA 496)*, the evidence of record indicated that the Staff participated in many earlier drafts of the agreement *(ROA Tr. Vol. 6, p. 959, lines 12-16)* and that the Staff had an articulated intention of what it wanted the stipulation to reflect concerning further prudence reviews of the Missouri Agreements *(ROA Shaw Rebuttal, Ex. 15, at p. 9, lines 9-11)*.

In addition, while it is true that no one could read the mind of Mr. Hack, Staff's attorney at the time, the Commission contends that it would be

unreasonable to conclude that Mr. Hack would draft a document blatantly contrary to his Staff client's wishes.

On the other hand, the Appellants' intentions regarding the agreement were expressed by Mr. Langley who testified that, among other things, the stipulation barred the Staff's proposed disallowance review and precluded any further review of the decisions associated with the Missouri Agreements. Mr. Langley added, however, that other issues related to those agreements could come before the Commission for review, *i.e.*, certain compliance and operational matters. (*ROA, Ex. 5, pp. 4-7).*

Mr. Langley, also testified that he would not have authorized a significant settlement payment through the Stipulation unless resolution of the prudence of the Missouri Agreements was resolved in perpetuity. (*ROA, Ex. 5, pp. 5-8*).

The Commission submits that the intentions of the parties regarding the meaning of the stipulation were at opposite poles. To further exacerbate the situation, the Commission noted that "Staff's ability to establish the actual intent of its representatives who negotiated the stipulation and agreement was hampered by the fact that the person who served as the Commission's General Counsel during the negotiations, the person who largely drafted the stipulation and agreement and handled negotiations on behalf of Staff, is now a vice-president of MGE (a party to this case). In addition, the attorney who appeared on behalf of Staff at the

proceeding in which the Commission approved the stipulation and agreement represented Mid-Kansas/Riverside in this case." (*ROA, 496, also citing Exhibit 25*).

Therefore, the Commission submits that, in the context of the intentions of the parties, and their respective interpretations of the agreement, there was ample and reasonable justification in the record for the Commission to conclude that the evidence regarding the interpretations of this ambiguous document was inconclusive (*ROA 495*).

MKP and Riverside also attack the Commission's decision not to interpret the contested agreement by asserting *at page 26 of their initial Brief* that the primary consideration the appellants received in the stipulation itself was the elimination of further prudence reviews associated with the Missouri Agreements.

The Appellants urge through Mr. Langley's testimony (*ROA, Ex.5, pp. 5-6*) that they would not have authorized a significant settlement payment under the Stipulation as a mere stop gap measure, but only committed this amount to forever resolve the prudence of the decisions associated with the execution of the Missouri agreements.

However, the Appellants omit important additional details regarding payment of this settlement money. Specifically, a review of Paragraph 6 of the agreement indicates that this payment settled all prudence issues related to

Commission cases GR-93-140, GR-94-101, GR-94-227, Gr-94-228, GR-95-82 and GR-96-78. (*ROA, Schedule DML 1, p. 6 paragraph 6*). Therefore, based on this additional information regarding the settlement payout, another reasonable interpretation of this scenario would be that this payment was tendered to settle these specified cases, and that the payout did not represent a perpetually final settlement of all subsequent prudence reviews of the Missouri agreements.

The Commission articulated a similar analysis in its decision when it said "it seemingly would have been easy for the parties to have simply stated that the prudence of entering into the Missouri Agreements was finally settled, rather than naming only two of its contracts." (*ROA 510*). Thus, the Commission submits that since the elegantly simple language of "finally settled" was not used in connection with the settlement payment, it casts doubt on the Appellants' assertion that settlement moneys permanently resolved future prudence reviews of the Missouri Agreements.

Mr. Langley's Testimony Was Not Wrongly Excluded by the Regulatory Law Judge. Responds to Points Relied on II B 2 b.

MKP/Riverside ask this court to reconsider evidence related to Mr. Langley's testimony connected with Mr. Hack that was excluded by the Commission's hearing officer (also called Regulatory Law Judge) during the administrative hearing in this case. However, MKP/Riverside cite no authority for

the proposition that a Hearing Officer or Regulatory Law Judge cannot exclude evidence in the absence of an objection to that evidence. That is simply because there is no such authority. In fact, there is authority to the contrary on this exclusionary issue.

The legal truth is that the trial court may, *sua sponte,* in his or her discretion, exclude evidence on competency or foundation grounds, *despite* the failure of counsel to lodge an objection, *see 75 Am Jur 2d 1994, §410 at page 602,* citing among other cases, *Anderson v. Asphalt Distributing Co.,* 55 S.W.2d 688 (Mo.) 1933, 86 ALR 1033, *MacCurdy v. United States* (CA5 Fla) 246 F2d 67, cert den 355 US 933, 2 L. Ed 2d 416, 78 S Ct 415.

During the hearing, the Regulatory Law Judge based her exclusionary ruling on concerns related to the attorney-client privilege (*ROA, Transcript Volume 5, page 739, lines 1 through 17, ROA Transcript Volume 3, page 294, lines 22-25, page 295, lines 1-7).*

Alternatively, the Judge excluded the same evidence because there would not be an opportunity to cross-examine Mr. Hack, the person who provided the information in the exhibits that were excluded. From the Commission's point of view, implicit in this exclusionary ruling is since Hack was not testifying and not being subjected to cross-examination, his testimony was in the nature of hearsay. There was no indication in the record that Hack's comments were not being

introduced for proof of the matter asserted. Hearsay statements, or out of court statements, used to prove the truth of the matter are generally inadmissible. *State v. Barnett*, 980 S.W.2d 297, 306 (Mo. banc 1998).

Factually, an examination of the record indicated that Mr. Hack was unwilling to take the witness stand in the proceeding (*ROA, Transcript Volume 5, page 736, lines 4 through 6*) and as a result, MGE withdrew Mr. Hack as a witness in the proceeding. (*ROA, Tr. Vol. 5, p. 736, lines 7-11*).

It *seems* unreasonable to the Commission that MKP and Riverside would now seek reconsideration of Mr. Hack's excluded testimony since the Appellants admitted that they had the option of calling Mr. Hack to the stand during the hearing, and they opted not to do so. (*ROA, Tr. Vol. 5, p. 740, lines 12-18*). Furthermore, there was no indication that the Commission Staff intended to call Mr. Hack as a witness, and the Staff did not, in fact, attempt to put him on the stand. Therefore, based upon the foregoing, it was not an error for the regulatory law judge to conclude that Mr. Hack would not be available for cross-examination and exclude the evidence connected with Hack's responses contained within Mr. Langley's testimonial offerings.

In relation to the attorney-client privilege, the Regulatory Law Judge initially inquired and then concluded, after no objection or response from the parties, that Mr. Hack (as the Commission's former General Counsel) would have

represented the Commission in at least one circuit court case (related to this case). *(ROA, Tr., Vol 3, p. 294, lines 9-16)*. The Judge went on to state that the characterization of Mr. Hack as only the attorney for the Staff may have changed by virtue of this scenario. (*ROA, Tr. Vol. 3, p. 294, lines 9-25, p. 295, lines 1-7*). More importantly, the judge added that the Commission was not willing to waive any attorney-client privilege between Mr. Hack and the Commission (*ROA, Tr. Vol.3. p. 294, lines 22 through 25, p. 295, line 1*). As a result of this logical progression of events, the judge struck the evidence on the basis of attorney/client privilege (*ROA, Tr. Vol. 5, p. 739, lines 3-17*), and, as mentioned earlier, the lack of an opportunity to cross-examine the statements of Mr. Hack offered by Mr. Langley.

In their *Brief at page 21*, MKP and Riverside point out that Section 536.070(8) provides for consideration of probative evidence that is admitted without objection, however they omit another part of that very same statute dealing with privilege and relevance that states:

> …***The rules of privilege*** *(*emphasis *added)* shall be effective to the same extent that they are now or may hereafter be in civil actions. ***Irrelevant*** *(emphasis added)* and repetitious evidence shall be excluded (Section 536.070(8) RSMo 2000).

As this court knows, confidential communications in the course of professional employment between attorney and client may not, without consent of the client, be divulged by the attorney; this is commonly called the "attorney-client" privilege. *U.S. v. Long*, 328 F. Supp. 233, 235 (1971). Under Missouri statutory law, an attorney is incompetent to testify concerning any communication made to the attorney by such attorney's client in that relation, or such attorney's advice thereon, without the consent of such client. Section 491.060(3) RSMo 2000. Clearly, the attorney-client privilege belongs to the client in terms of any waiver therof.

Precedent also exists that a hearing officer has an affirmative duty to exclude irrelevant evidence, even if the other party does not object to its admission. *Eastern Star Missionary Baptist Church v. Director, Missouri State Division of Family Services*, 632 S.W.2d 503,505 (Mo. App. E.D. 1982). In sum, the Commission submits that since there is a duty to exclude irrelevant evidence, exclusion of evidence that violates the enduring attorney-client privilege, or where the declarant cannot be cross-examined, is not an abuse of the hearing examiner's discretion. Realistically, the potential harm by admission of privileged evidence or evidence that cannot be tested by cross-examination regarding its truthfulness, is much greater than the harm posed by admission of merely irrelevant evidence.

MKP/Riverside, *at page 37 of their* Brief, cite *Knapp v. Mo. Local Govt. Employees Retirement Sys,* 738 S.W.2d 903, 913 (Mo. App. 1987) in connection with the argument that Mr. Langley's probative evidence should not be ignored. The Commission contends that the *Knapp* case is not appropriately cited in the context of *this* case for two reasons. Initially, it is not applicable because the *Knapp* decision has *nothing* to do with evidence that is excluded based on a recognized privilege or evidence constituting hearsay or otherwise not subject to cross-examination. Secondly, in *Knapp* the Court found that the Board or fact finder *totally* ignored the reports of three doctors and never mentioned them. *Knapp at 913.* The Commission did not ignore the testimony of Mr. Langley, he was questioned at some length by the Commissioners regarding his testimony (*ROA Tr. Vol. 3, pp. 438-511*). In addition, Mr. Langley's testimony was summarized and made a part of the Commission's decision in its Report and Order (*ROA at 495, 496).* Factually, *Knapp* cannot apply here.

Therefore, based upon all the foregoing, exclusion of specified portions of Mr. Langley's testimony related to Mr. Hack was not an abuse of the discretion by the Regulatory Law Judge.

Additionally, for the same reasons articulated just above, the Langley evidence that was properly excluded by the Regulatory Law Judge should not be considered by this court, as is requested by MKP and Riverside in their Brief.

Staff Witnesses Did Not Make the Admissions Asserted

(Responds to Points Relied II B 2 c.)

MKP and Riverside contend *at page 38 of their initial Brief* that Staff witness Shaw admitted at the hearing that the first sentence of paragraph 5 of the Stipulation would not be subject to further ACA prudence review and they argue that Mr. Shaw made another admission barring prudence reviews of the decisions associated with the execution of the Missouri Agreements during a deposition associated with this case.

A closer examination of the administrative record reveals that the statements characterized as "admissions" by the Appellants are nothing more than selected excerpts of Shaw's testimony taken out of context.

For example, when MKP and Riverside mention *at page 38 of their Brief* that Shaw said "the decisions associated with the Missouri Agreements would not be subject to further ACA prudence review," they omit the rest of Mr. Shaw's statement, taken in the context of prudence reviews, that "… there is no language as far as execution of the MGE –specific contracts not being reviewed. There was an expectation that they would be reviewed" (*ROA, Tr. Vol. 7, p. 978, lines 17-25 and p. 979, line 1*).

In addition, the deposition that is identified *(ROA Ex. 8, Schedule WCP 7-1, p. 2)* regarding more of Shaw's purported admissions does not produce the

conclusion sought by the Appellants. A reading of this singular deposition page reveals nothing more than a statement by Mr. Shaw that, in terms of prudence analysis, it was the decision making process of entering into agreements that the Staff was concerned about. The Commission submits that Shaw is merely stating what constitutes part of a prudence appraisal, which is whether the decision or conduct of entering into these Missouri Agreements was reasonable at the time they were executed. *Union Electric*, 27 Mo. P.S.C. (N.S.) 183, 194 (1985), quoting *Consolidated Edison Company of New York, Inc.,* 45 P.U.R. 4th 331 (1982).

Thus, a thorough review of Mr. Shaw's purported admissions, placed into context, does not reveal the admissions urged by MKP and Riverside.

The Stipulation and Agreement Should Not be Construed Against the Commission Staff Under the Circumstances of this Case. Responds to Points Relied II B 3.

The Commission does not dispute that Mr. Hack drafted the agreement under review. However, under the circumstances of this particular case, application of the rule against the draftsman is particularly inequitable and unjust.

In *Rouggly v. Whitman*, 592 S.W.2d at 523 (Mo. App. 1979) the court explained that the rule of construction requiring that ambiguous language be construed against the party responsible for its use, is based more on a concept of

appropriate allocation of blame for the faulty language, than on an attempt to ascertain true intent or meaning. Consequently, the court said, this rule is employed only as a last resort when other available data bearing on the agreement shed no light on actual intent or meaning.

Furthermore, the Commission would point out that this agreement was an agreement made between professional and sophisticated people. Mr. Langley was a corporate president (and also an attorney) and MGE is a recognized corporate entity. Mr. Langley acknowledged that he had legal counsel during the time the stipulation was being created (*ROA Tr. Vol. 3, pp. 477-480*). Therefore, to penalize the Staff with application of the draftsman rule seems inappropriate given the fact the Appellants were represented by counsel during the time frame the contract was being drafted.

Lastly, the disputed agreement did not involve a contract that was created with little or no input from the parties. The evidence established that the agreement was subject to a significant amount of negotiation and input both from the Appellants and MGE (*Sommerer's Rebuttal Testimony, ROA Ex. 16, p. 6, lines 11-13, p. 8, lines 15-23, p. 9, lines 7-23, and p. 10, lines 1-6) (Shaw's Surrebuttal Testimony, ROA, Ex.15, p. 7, lines 11-22, and p. 8, lines 1-9*). From an equitable and fairness perspective, since the respective parties took an active part in participating in the final agreement, and had legal counsel by their side, application

of the rule against the draftsman should not be applied against the Commission's Staff in this case.

In addition, there is a line of cases that technically militate against application of the draftsman rule. For example, in *Graham v. Goodman*, 850 S.W.2d 351, 355, 356 (Mo. banc 1993) this Court held that the contract construction canon against the draftsman is employed as a last resort and only when there is no evidence of the parties' intent.

In *Berman v. Berman*, 701 S.W.2d 781, 788 (Mo. App. 1985) the court used different language, but enunciated the same view as *Graham* above, when it held that the rule requiring ambiguities be used against the maker of the contract only applies in the absence of any evidence showing the intentions of the parties.

The Commission is aware of Court of Appeal's decision in *Missouri Cons. Health Care Plan v. Blue Cross Blue Shield of Mo.*, 985 S.W.2d 903, 910 (Mo. App. W.D. 1999) indicating that the draftsman principle applies if the parties' intent "cannot be determined otherwise from parole evidence." However the language of that decision is very brief, and may refer to a scenario where, in fact, there is no evidence of the parties' intent. Therefore the Commission is uncertain as to whether this decision constitutes contrary authority

Therefore, the Commission contends that the case law cited above establishes that the rule against the draftsman is not a favorite of the courts and

should not be used under the particular circumstances of this case since the Stipulation was a collaborative effort by parties who were represented by Counsel.

III. The Court of Appeals Did Not Commit Error by Dismissing the Appeal For Lack of Jurisdiction. The Commission Decision Regarding the Stipulation Was Not a Final Order Subject to Appeal.

A. Standard of Review

Right to appeal is purely statutory and appeal is only appropriate from final judgment. *Reis v. Peabody Coal Co.*, 935 S.W.2d 625 (App. E.D. 1996).

A "final appealable judgment" is one that disposes of all issues and all parties in one case and leaves nothing for further determination, *Erickson v. Lockhart*, 639 S.W.2d 418 (App. E.D. 1982), *Mohawk Flush Doors Inc. v. Kabul Nursing Homes, Inc.*, 938 S.W.2d 347 (App. S.D. 1997). What is or is not a final judgment or order for purposes of appeal depends on circumstances of each case. *Use of Fletcher v. New Amsterdam Cas. Co.*, 430 S.W.2d 642 (App. 1968). Appellate court lacks jurisdiction whenever judgment appealed from is not final, *Taylor v. F.W. Woolworth Co.*, 641 S.W.2d 108 (Sup 1982).

At page *8 and 9* of the Western District's opinion the Court makes it clear that the review sought by MKP/Riverside was misplaced because the Commission's non-interpretation of the Stipulation did **not** resolve the issue of the ultimate meaning of that document. The Court stated, *inter alia*, as follows:

Rather than appealing the PSC's decision denying the Staff's recommended disallowance in Case No. GR-96-450, MKP and Riverside are appealing, in their terms, the PSC's "reaching the merits" of that issue because it was barred by the Stipulation. This, of course, is the exact same issue that was raised by them in their motion to dismiss or limit the proceedings, which, as noted, *supra*, was denied by the PSC and appealed to this court in Riverside I. And as we noted, *supra*, that appeal was dismissed inasmuch as the PSC's denial of the motion was found by this Court to be an interlocutory order that was not subject to judicial review. Riverside I, 26 S.W. 3d at 400**.** And while MKP and Riverside have tried to re-characterize the decision of the PSC that they are appealing, that re-characterization will not change the result. The fact remains that the only final decision reached by the PSC in Case No. GR-96-450 subject to judicial review, in accordance with Chapter 386, is its decision denying the Staff's recommendation for an ACA disallowance, which MKP and Riverside did not and could not appeal inasmuch as they were not aggrieved thereby. As such, they were left powerless to seek judicial review of any interlocutory orders of the PSC leading up to its final decision, including its order denying their motion to dismiss or limit the proceedings.

The Commission's Report *and Order at pages 12 and 26* (*ROA 510)* made it clear that the Commission was "…unable to determine the intended meaning of

Stipulation and Agreement". Since there was no final decision regarding the Stipulation's meaning, the Western District correctly concluded that the Commission's Order relating to that Stipulation was interlocutory in nature, and could not be reviewed. Appellate courts do not render opinions on non-existent issues, *State ex rel. Missouri Cable Television Ass'n v. Missouri Public Serv. Comm'n*, 917 S.W.2d 650, 652 (Mo. App. W.D. 1996). Courts cannot render advisory opinions, *Robinson v. Mo. State Highway and Transp. Comm'n*, 24 S.W. 3d 67, 81 (Mo. App. W.D. 2000).

CONCLUSION

The Commission's Report and Order in GR-96-450 was lawful and reasonable and should be affirmed in all respects.

The Court of Appeals decision dismissing MKP/Riverside as the Appellants should be affirmed because they were not "aggrieved" by the Commission Order in terms of standing to see review. Rule 84.05(e), statute and case law support the requirement that a person seeking review be aggrieved, regardless of whether the review sought is viewed as an "appeal" pursuant to Sections 386.540.1 and 512.020, or a "writ of review" pursuant to Section 386.510.

The Court of Appeals dismissing the Appeal because the Commission decision regarding the Stipulation and Agreement was not a final order subject to review should also be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b) and (g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Mo. R. Civ. P. 84.06(b) and, according to the word count function of MS Word 2000 by which it was prepared, contains 9,069 words, exclusive of the cover, Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing this Substitute Brief of the Respondent in electronic form complies with Mo. R. Civ. P 84.06(b) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed, postage prepaid this 22nd day of March, 2005 to:

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